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LEGAL ANALYSIS OF THE DIRECTIONS OF RECOMMENDED INTERPOL REFORM AIMED AT PREVENTING THE ABUSE OF RED NOTICE MECHANISMS

In view of the changing reality, INTERPOL is forced to demonstrate its continued readiness to introduce reform and adjust its structures and procedures according to current needs. Our initiative and, at the same time, appeal addressed to legislators, is that they immediately undertake efforts in order to prevent INTERPOL from being used for political purposes and to ensure that its potential is directed towards the prosecution of criminals, and not persons whose only 'offence' is opposing the political authorities. The above discussed issues are important also from the perspective of the EU, whose voice should have a material impact on the reform, as:

- they also concern EU nationals,
- they apply to persons who have been granted asylum or another form of protection in the EU,
- the European Union provides financial support to INTERPOL,
- INTERPOL is headquartered on the territory of the EU,
- INTERPOL's basic activities, which include the processing of personal data, are carried out within the territory of the European Union and hence, INTERPOL must respect the Union's legal order and submit to control of the European Data Protection Supervisor.

INTERPOL is one of the most effective international institutions – its operations translate into concrete results. It is also one of the most widespread organisations associating 190 Member States, including the Vatican. INTERPOL pursues laudable goals but it seems that its officers do not allow the thought that effective mechanisms, developed to combat crime, may be cynically abused by countries such as Russia, Iran, Turkey, Belarus, Kazakhstan, Ukraine or Azerbaijan. It regards not only refugees, but also EU nationals. It is unacceptable that due to the imperfections of procedures, they become prisoners of Russia or other non-democratic states, even beyond its borders.

The situation calls for immediate action. INTERPOL and the European Union must resist the attempts, initiated by the aforementioned states, to manipulate and discredit mechanisms of the organisation,. In addition, these states often benefit from non-coherence of the asylum system in the EU, the Schengen Information System (SIS) and Interpol's Red Notice mechanism. Two values are competing here:

- the sovereignty of the EU states which are reluctant to adopt a single asylum policy,
- the right to freedom and human dignity.

It is necessary to resolve the contradiction between these principal values.

It is proposed to synchronise the procedure of application of the Red Notice with asylum and extradition proceedings through the automatic removal of a person from the Red Notice register in cases where asylum has been granted or extradition has been denied on the territory of an EU Member State. This is intended to prevent such a situation whereby a refugee, who has been granted asylum and a travel document in one state, and for whom the court in that country

adjudicated on the non-permissibility of their extradition to their country of origin, is subsequently detained and arrested in another EU Member State. The law which permits such a practice requires immediate amendment. Where there is a concern that Article 3 of INTERPOL's Constitution (prohibition to use INTERPOL mechanisms in order to pursue a person for political, military, religious or racial reasons) is violated, it is postulated to impose upon a refugee or an EU national covered by the Red Notice procedure, the obligation to inform the authorities of a change in their place of stay within the EU. Such a solution would be an advantageous change to their status and would release EU states from the application of politically cumbersome procedures.

The system's imperfections are most noticeable in the practical application of regulations. There is a symptomatic case of the Russian and French citizen Nikolay Koblyakov who may not travel freely within the territory of the EU as he is the subject of a Red Notice issued upon Russia's request. Despite the fact that Bulgaria denied his extradition, he may be arrested in any other EU state. Hence, in its desire to neutralise its critic, Russia may achieve its goal by taking advantage of the good will of EU states which place trust in the mechanisms of international organisations with global reach. This cynical game (played not only by Russia) must be firmly opposed and eliminated through wise legal regulations.

Another well-known example illustrating the shortcomings of INTERPOL's systems in relation to the asylum mechanism is the case of the Kazakh national Mukhtar Ablyazov. Even though he had been granted asylum in the UK, justified by his opposition activities, Ablyazov was arrested under a Red Notice in France where all court instances approved his extradition to Russia and Ukraine. These states are working closely with Kazakhstan and, requesting his extradition for alleged economic offences, in fact, they conceal the genuine initiator of the request, i.e. the authorities in Astana.

Also, the case of Aleksandr Mikhalevich reveals the imperfection of the functioning of INTERPOL procedures and the non-coherence of the asylum system, the creation of which is on the European Union's agenda. Having fled to the Czech Republic, the Belarus oppositionist was granted political asylum there. A Czech court also refused the extradition requested by Minsk. Nevertheless, in December 2011, Mikhalevich was arrested at Warsaw airport because he was recorded in Interpol systems as a wanted person. The Polish police, who received the relevant information from INTERPOL, had to enter Mikhalevich into the database of wanted persons, in accordance with the applicable procedures. The Polish party was not informed, however, that 6 months previously, INTERPOL had concluded that the request to arrest MIkhalevich was politically motivated. There is no doubt that the procedures have to be applied with stricter discipline or have to be designed to otherwise help eradicate such situations as those described above.

REMARKS AND CONCERNS REGARDING SYSTEMIC ISSUES

A step in the right direction was the adoption by INTERPOL's General Assembly in Hanoi, in 2011, of the resolution on the registration and publication of INTERPOL's Constitution by the UN. This provided the basis for the ratification of the Constitution. Automatically, the Constitution became binding upon INTERPOL's Members; for Poland, it came into force in December 2014. The aim of the Polish ratification statute was to relate INTERPOL's Constitution to the Polish legal system. **Questions continue to arise, however, to which no answers can be found.** In all legal systems, the procedures in such important matters as fundamental rights and freedoms are regulated by the highest-ranking legal acts, with the Constitution highest of all. Article 41(1) of the Constitution of the Republic of Poland says: "Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by the law**"**. Article 87 of the Constitution stipulates that "The sources of universally binding

law of the Republic of Poland shall be: **the Constitution, laws, ratified international agreements, and decrees**." Article 91 says that "After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly."

The question arises whether the attribute of legality can be applied to the Red Notice, the source of which is not the Constitution, but INTERPOL's rules and regulations?

Can the highest-ranking powers, which interfere with the values set out in national constitutions, the Convention for the Protection of Human Rights and Fundamental Freedoms and the Universal Declaration of Human Rights, be granted to rules and regulations of an international organisation even if it is an organisation of such a special nature and importance as INTERPOL?

Can such a legal act, which is not a law or an international agreement provide for the deprivation of a human's freedom even if it is justified in the case concerned?

Does an administrative body have the right to formulate and grant itself powers awarded by parliaments and held, throughout the world, by judiciaries?

Importantly, the Constitution of INTERPOL which is a sort of international administrative institution (and not a judicial body) does not include important provisions for data processing which are included in the legal competences of this institution.

A point of reference in this regard may be the functioning of the international judiciary. Under Article 58 of its Statute, the International Criminal Court in the Hague issues warrants of arrest. Poland ratified the Statute, and, in accordance with the hierarchy of the sources of law, international law of a certain level takes priority over national law. In the case of INTERPOL, it is not its Constitution which regulates the functioning of the so-called Red Notice in the legal order. This is done exclusively under the General Regulations, even if these were adopted almost unanimously at the General Assembly in Hanoi in 2011. The Constitution merely mentions the existence of the Commission for the Control of INTERPOL's Files, without defining its function; its powers and controlling nature are provided for in the General Regulations only.

The foregoing indicates that the binding force of the legal acts issued by INTERPOL, in particular concerning the processing of personal data, and the acknowledgement of legality of INTERPOL's Red Notices, is not unambiguous. Such a view has often been voiced by state courts which have had concerns as to the recognisability of the RN. In national legal systems, rules and regulations are in the nature of order-setting provisions whilst such important issues as deprivation of freedom, are regulated solely by statutes and international agreements.

FURTHER REMARKS ON INTERPOL PROCEDURES

Interpol does not have effective mechanisms in place to prevent abuses on the part of its Members. Non-democratic states such as Iran, Belarus, Turkey, Russia, Kazakhstan, can thus, with impunity, make use of the Red Notice institution which restricts freedom of movement, or go as far as initiating the arrest of oppositionists until the courts resolve the issue of the permissibility of their extradition. The problem of politically motivated requests addressed to INTERPOL pertains also to states undergoing political transformation, such as Ukraine, where requests generated during the non-democratic rule of Yanukovych (against Ablyazov or Tatiana Paraskevich) have not been withdrawn by the new authorities due to corruption mechanisms and the failure to replace staff in investigative bodies and the administration of justice.

Article 3 of INTERPOL's Constitution prohibits INTERPOL from undertaking any intervention or activities of a political, military, religious or racial character. As a rule, INTERPOL should therefore be operating in an independent and impartial way, in observance of the law on extradition, in order to protect persecuted people. In practice, the opposite is often true. When the nature of a matter is evaluated, the **predominance test** is applied to check whether a political (military/religious/racial) background dominates. If so, INTERPOL is obliged to apply Article 3 of its Constitution and refuse to cooperate. Nonetheless, the Red Notice procedure is very easy to apply in cases where an element of doubt exists.

The Members have quite a lot of freedom when defining the nature of the case, since they have the sovereignty in weighing up the motives behind a given prosecution. **The provisions of INTERPOL's Constitution and its Rules and Regulations do not, in fact, envisage sanctions against its Members for abusing their rights. Practice has shown that the provisions of Articles 130 and 131 of its Rules on the Processing of Data envisaging intervention from central INTERPOL structures against states which violate its regulations are not applied to the governments which are notorious for abusing INTERPOL mechanisms and the good will of other Members. The sanctions that are envisaged – suspension or deprivation of a party of the right of access to data – are insufficient. It is only the fear of full exclusion from this community that may be considered a major deterrent to Members who abuse their rights.**

Note should be taken of the serious consequences of the entries made in both INTERPOL and the Schengen Information System (SIS). If a refugee is placed in the SIS, he or she is prevented from obtaining residence status, a travel document in the country of residence and employment. The Red Notice, in turn, almost inevitably means arrest and a long clarification procedure. This was experienced, amongst others, by Tatiana Paraskevich, who spent more than two years in a Czech prison, and a Canadian businessman who spent a year in a Lebanese prison as a result of Algeria applying to INTERPOL for a Red Notice because the businessman had supplied poor quality agricultural produce. It has become common practice to imprison people without a criminal record, , unprepared mentally for being imprisoned, for whom such an experience becomes an irreversible trauma. A polarisation of INTERPOL procedures and refugee procedures applied by EU Member States is clearly apparent.

It is proposed to facilitate the flow of information between INTERPOL's General Secretariat and its National Central Bureaus. In accordance with Article 79 of INTERPOL's Rules on the Processing of Data, a Red Notice is placed in the central database and then placed in the national database which functions autonomously. Information about the removal of an entry from the central database should also be automatically transmitted to the national databases. Even though the application of such a mechanism seems obvious, it does not function in practice due to the autonomous nature of the national databases. Numerous cases are noted whereby persons deleted from the central register are arrested on the borders of other states because they remain on national lists.

On 1 July 2012, the new *INTERPOL Rules on the Processing of Data* came into force. They reformed, amongst other things, issues relating to decisions on the Red Notice system in order to apply high standards in their publication and circulation. Still, however, the decision on the entry into the register is not made by an independent tribunal. Before taking a decision, the Secretariat may only request the opinion of the Commission for the Control of Interpol's Files, which is an independent body but financed by Interpol. Members of this Commission are clerks and not specialists in human rights. In accordance with Article 2 of the Rules on the Control of Information and Access to INTERPOL's Files, the Commission's chair is required to have a legal background, and other members have to be qualified in IT, the processing of data and they should have police experience.

It is proposed to ensure greater transparency of the Commission's work, both as regards requests for information concerning entries, complaints against entries and requests for deletions. Of essential importance here is the time of examining cases and communication with the requesting party.

Ease of communication with the Secretariat and the Control Commission may only have a positive effect on the validity and substantive justifiability of the entries. Official initiatives by Members are also being launched in this regard. The need is arising to create a mechanism for consultation to verify in advance the names added to the wanted lists abroad.

To this end, a uniform procedure needs to be introduced for INTERPOL Members to have the capability to review in advance (of arrest/extradition requests) the names placed on the wanted lists abroad, and for the remarks on the names to be immediately processed before such names are entered into INTERPOL's databases.

Flow of information, openness of information, a transparent procedure for deleting entries and consultations with Members must be provided for in a legal act which ranks higher than rules and regulations. These could, for instance, be transferred to the Constitution.

Another issue is the extent of confidentiality. There are special, understandable cases of confidentiality, but there seems to be no consistency in placing particular persons in official and unofficial databases. For instance, the leading dissident, Mukhtar Ablyazov, is on the Red Notice list which is generally accessible via the Internet, and his associate, Tatiana Paraskevich, for obvious reasons, with much more lenient charges, is on a classified list. **The placing of a name in classified register should be an exception for which detailed rationale is provided.**

CONCLUSIONS AND RECOMMENDATIONS:

1) The development of sources of law for Interpol, whose status will not raise concerns as regards their legality or conformity with international and national legal orders.
2) The introduction and enforcement of stronger sanctions against states filing requests for prosecution, abusing the RN mechanism.
3) The facilitation of the information flow between the General Secretariat and National Bureaus as regards amendments and striking off entries.
4) The enhancement of transparency of Interpol authorities as regards:
    - the provision of information about an entry
    - complaints against an entry
    - requests for striking an entry off
5) The adoption of deadlines for processing requests and an obligation to communicate with the requesting party.
6) The introduction of a regular procedure for Members to be able to provide information and comments on persons with regard to whom an application has been filed for initiating the Red Notice procedure.
7) The introduction of a rule defining that a detailed rationale is provided when a name is entered into a classified register of persons covered by a Red Notice.

8) The synchronisation of the application of the Red Notice procedure with asylum and extradition proceedings through the automatic deletion of Red Notices in cases where asylum is granted or extradition is refused.

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